APPENDIX A

In the United States District Court
Western District of Arkansas
El Dorado Division

Globe Indemnity Company, Plaintiff,

vs. No. ED-73-C-30.

James R. Williams, Defendant.

ORDER

(Filed in U. S. District Court April 1, 1974)

Now on this 13th day of March, 1974, came on before the Court for hearing the Motion of the defendant, James R. Williams, for summary judgment and the cross-motion of the plaintiff, Globe Indemnity Company, for summary judgment.

The matter being presented upon the motions of the plaintiff and the defendant for summary judgment and the exhibits to such motions and the briefs of counsel on behalf of the parties and other things and matters before the Court, from all of which the Court being well and sufficiently advised doth find:

That it has jurisdiction of the parties and the subject matter sufficient for the consideration of these matters on motion for summary judgment and the entry of Order of Court pursuant thereto; that there remains no genuine issue of fact in dispute and that the cause is in a condition that it can be disposed of upon the motions for summary judgment; that the motion for summary judgment by the defendant, James R. Williams, ought

in law and equity to be denied and the motion for summary judgment by the plaintiff, Globe Indemnity Company, ought to be granted.

It Is Therefore by the Court Considered, Ordered, Adjudged and Decreed that the motion of the defendant, James R. Williams, for summary judgment be and the same is hereby denied and the motion of the plaintiff, Globe Indemnity Company, for summary judgment be and the same is hereby granted and the plaintiff, Globe Indemnity Company, be and it is hereby granted judgment against the defendant, James R. Williams, for the sum of $44,475.56 together with interest thereon from March 13, 1974, until paid at the rate of six (6) per cent per annum and for costs of this proceeding and for all of which execution, garnishment or other writ in aid of judgment may issue.

Given Under my Hand as Judge of the El Dorado Division, United States District Court, Western District of Arkansas, this 1st day of April, 1974.

s OREN HARRIS
United States District Judge

Approved as to Form:

s WILLIAM S. ARNOLD
Attorney for Plaintiff

s RICHARD H. MAYS
Attorney for Defendant

APPENDIX B

James R. Williams,

Appellant,

v.

Globe Indemnity Company,

Appellee.

No. 74-1287

United States Court of Appeals
Eighth Circuit

Submitted Oct. 14, 1974

Decided Oct. 30, 1974

Rehearing and Rehearing En Banc

Denied Dec. 5, 1974

Employer's crime insurer, which had paid employer amount embezzled by employee, brought action against employee. The United States District Court for the Western District of Arkansas, Oren Harris, J., denied defendant's motion for summary judgment based on a statute of limitations defense, and granted summary judgment in favor of the insurer and defendant appealed. The Court of Appeals, Heaney, Circuit Judge, held that crime insurer became subrogated to insured and was subject to identical three-year statute of limitations as was insured, and, having failed to bring action against employee within three years of discovery of the embezzlement, insurer's cause of action against employee was barred, notwithstanding insurer's claim

that it had some broader right to indemnity and that its own cause of action did not accrue under statute until its payment to insured.

Reversed and remanded with directions.

Insurance Key 606(9)
Limitation of Actions Key 56(2)

Crime insurer, which paid insured employer amount embezzled by insured's employee and became subrogated to insured, was subject to identical three-year statute of limitations as was insured, and, having failed to bring action against employee within three years of discovery of the embezzlement insurer's cause of action against employee was barred, notwithstanding insurer's claim that it had some broader right to indemnity and that its own cause of action did not accrue under statute until its payment to insured. Ark.Stats § 37-206.

Richard H. Mays, Mays & Landers, El Dorado, Ark., for appellant.

Francis L. Kenney, Jr., St. Louis, Mo., and William S. Arnold, Crossett, Ark., for appellee.

Before Heaney, Bright and Ross, Circuit Judges.

Heaney, Circuit Judge.

Appellant Williams embezzled approximately $50,000 from his employer, Monsanto. The embezzlement was discovered by March 12, 1970, and Williams confessed in detail to his employer on that date. The employer made a claim against its insurer (Globe), the appellee, on a blanket crime policy, and Globe paid the employer the amount embezzled, minus a deductible,

on August 31, 1970. Globe brought this diversity action against Williams on June 7, 1973, to recover the sum paid. Summary judgment was granted in favor of Globe. The sole issue presented on appeal is whether or not the District Court erred in denying Williams' motion for summary judgment based on a statute of limitations defense. We hold that Globe's action was barred by the statute of limitations and, therefore, reverse and remand with directions to enter judgment in favor of appellant Williams.

Both parties agree that the applicable statute of limitations is Arkansas Statute 37-206, which provides:

> The following actions shall be commenced within three [3] years after * * * the cause of action shall accrue: First, all actions (of debt) founded upon any contract, obligation, or liability, (not under seal [and not in writing],) excepting such as are brought upon the judgment or decree of some court of record of the United States, of this, or some other State; * * * fourth, all actions (of account, assumpsit, or on the case,) founded on any contract or liability, expressed or implied; * * * sixth, all actions for taking or injuring any goods or chattels.

This statute has been held to apply to actions based upon common law fraud, deceit, or conversion. *See*, Air Leases v. Baker, 167 F.Supp. 145, 148 (W.D. Ark. 1958); Conditt v. Holden, 92 Ark. 618, 123 S.W. 765 (1909); Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), cert. denied, 400 U.S. 852, 91 S.Ct. 47, 27 L.Ed.2d 90 (1970) (dictum). Globe does not deny that it applies to the embezzlement here. The statutory period under this enactment commences to run at the time of the discovery of the fraud. *See*, Wrinkles v. Brown, 217 Ark. 393, 230 S.W.2d 39, 41 (1950); Metropolitan Life Ins. Co. v. Williams, 197 Ark. 883, 125 S.W.2d 441, 448 (1939); Wright v. Lake, 178 Ark. 1184, 13 S.W.2d 826, 827 (1929). Since the employer discovered the embezzlement on March 12, 1970, the statute of

limitations barred the employer's cause of action for recovery of the money after March 12, 1973.

Globe contends that, notwithstanding foreclosure of the employer, its own cause of action did not "accrue" under the statute until its payment to Monsanto. Since suit was brought within three years of that date, it argues that the District Court was correct in holding that its action was not barred. The appellant contends, on the other hand, that Globe is suing solely in its capacity as subrogee of the rights of the employer, and that it is settled law that a subrogee can acquire no more rights against a third party than are held by its subrogor. Hence, he argues, Globe is subject to the identical bar under the statute as was its subrogor, Monsanto, and having failed to bring the action within three years of the discovery of the embezzlement, Globe's cause of action is barred. We agree with the latter view.

The theory of subrogation is that the subrogee steps into the shoes of his subrogor. As such, he takes subject to all defenses which the third party could have asserted against the subrogor, including the statute of limitations:

> Since the insurer's claim by subrogation is derivative from that of the insured, it is subject to the same statute of limitations as though the cause of action were sued upon by the insured. * * *

16 Couch, Insurance 2d § 61:230 at 367 (1966) (footnotes omitted).

This general rule of subrogation law was recognized by the Arkansas Supreme Court in Ogden v. Watts, 186 Ark. 500, 54 S.W.2d 292 (1932):

> It is the law, however, as is very clearly stated in Charmley v. Charmley [125 Wis. 297, 103 N.W. 1106 (1905)], that the right acquired by the party thus subrogated

> is to use the security just as the original holder thereof might have done, and that "the devolution of such cause of action does not interrupt the running of the statute. Upon the termination of the full statutory period measuring the life thereof, it is destroyed. * * * To enable a person to see what interest one has in the property of another by the right of subrogation, he must look at the matter from the viewpoint of the original owner before the devolution." [*Id.* at 1111.]

Ogden v. Watts, *supra* at 292.

Admittedly, the *Ogden* case is distinguishable since the statute of limitations had already expired on the subrogor's claim before the subrogation took place, and, therefore, the subrogor had no viable cause of action to convey to the subrogee. But the *Charmley* case, which is quoted, involved a subrogation which took place before the statute had expired, and the court there held that the act of subrogation had not affected the running of the statute:

> * * * As we have said, where once the statute of limitations has commenced to run on a cause of action, no circumstance, not expressly provided by statute—and we have no statute applying to the circumstances here—will interrupt it. * * *

Charmley v. Charmley, *supra*, 103 N.W. at 1111.

Two recent cases in other jurisdictions have reached the same result where an insurance company became subrogated to its insured by paying off an uninsured motorist claim, and then proceeded to sue the uninsured motorist after the statute of limitations would have barred a direct action by the insured. *See*, American States Ins. Co. v. Williams, 278 N.E.2d 295 (Ind.App. 1972); Insurance Co. of North America v. Carnahan, 446 Pa. 48, 284 A.2d 728 (1971). In each instance, the court held that

the statute began to run from the date of the accident, rather than the date of the award or payment to the insured. We agree that this is the proper rule and, therefore, hold that since the subrogor, Monsanto, was barred by the statute, Globe, as its subrogee, was also barred.

We turn briefly to Globe's alternate contention that an implied or "quasi" contract of indemnity arose upon payment by Globe to the employer, under which contract Williams only then became obligated to reimburse Globe. The cases cited by Globe do not support this argument.

For example, Wolverine Ins. Co. v. Tower Iron Works, Inc., 370 F.2d 700 (1st Cir. 1966), was an action for allocation of loss between two tortfeasors. There, a person injured while diving into a swimming pool settled with the pool owner's insurance company. The insurer then sued the installer of the pool for indemnification, and the installer claimed that it could no longer be sued because the pool had been installed eight years earlier. The Court made it clear that it permitted suit only on a theory of common law indemnity which was triggered because the owner and installer were "two tort-feasors not *in pari delicto*" *Id.* at 703. Here, on the other hand, no joint tortfeasors are involved, and there is but classic subrogation.

Federal Ins. Co. v. Summers, 330 F.Supp. 1041 (D.Mass. 1970), also fails to support Globe's theory. In that case, a customer made a deceitful misrepresentation, in 1958, to a brokerage house (Hutton). He claimed that he had not received certain securities. New securities were delivered to the customer and an indemnity bond was entered into by an insurance company in reliance on the customer's proof of loss statement. The fraud was concealed until 1966; on discovery, the insurer paid Hutton for the loss and promptly brought a successful action against the customer. That case can be distinguished from the present one on two grounds: (1) the customer had made a

direct misrepresentation to the insurer in submitting the false proof of loss; and (2) the statute of limitations had *not* expired against the *subrogor* (Hutton), because the fraudulent concealment had tolled its running. Thus, *Federal Insurance* is fully consistent with the rule that a subrogee is barred by the same limitation period as is the subrogor.

Globe's contention that it is not suing solely on a narrow theory of subrogation, but has some broader right to indemnity, is similar to a claim rejected by the court in American States Ins. Co. v. Williams, *supra*, 278 N.E.2d at 299-300:

> The point of departure between the parties is not whether the right of subrogation existed but rather the exact nature of the right. Appellant argues that the insurer acquires the right of indemnification against Appellee when actual payment is made to its insured, thereby implying that an insurer has some type of implied contract or liability imposed by law vis-a-vis the uninsured motorist * * *.
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> As a general rule, indemnity is not allowed absent an express or implied contract. There are, however, certain exceptions as between joint tort-feasors, one of whom was liable only because of his relationship to the other joint tort-feasor, or because of a specific statute where the right is imposed. None of these exceptions are applicable to this case.
>
> The duty of the insurer to pay damages arises solely out of its contract with its insured and not by reason of any special relationship between the insurer and the uninsured motorist. The rights acquired by the insurer upon payment to the insured are solely derivative rights of subrogation. * * *
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> * * * * * * *

> * * * Thus, the insurer stands in the shoes of the insured and takes no rights other than those which the insured had, and this is true regarding the applicable statute of limitations. * * *

We conclude that Globe had no separate right to indemnification on the facts of this case. The only rights it asserted against Williams were subrogation rights derived from Monsanto. Therefore, since Globe's subrogor would have been barred by the statute of limitations, it was error for the District Court to refuse to grant summary judgment in favor of defendant Williams. The judgment below is accordingly reversed and the cause remanded with directions to enter judgment in favor of Williams and against plaintiff Globe.